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NOTES

CONFLICT OF LAWS—DIVORCE—DOMICILE—It is now well settled that marriage is not a contract, but a status,[1] and that a state, in the exercise of its undoubted right to regulate the domestic and social condition of those domiciled within its borders,[2] may determine the commencement, continuation, and determination of such marriage relation.[3] A recent case in Delaware[4] illustrates the application of these established principles. The parties were citizens of and resident in Russia at the time of their marriage. They removed to this country, settled in Delaware,

[1] Bishop on Marriage and Divorce, §11: "Marriage, as distinguished from the agreement to marry and from the act of being married, is the civil status of one man and one woman legally united for life, with the rights and duties, which for the establishment of families and the multiplication and education of the species, are, and from time to time thereafter may be, assigned by the law to matrimony." Wharton on Conflict of Laws, § 126, III Ed.; Ditson v. Ditson, 4 R. I. 87 (1856).

[2] Shader v. Graham, 10 How. 82 (1851).

[3] Maynard v. Hill, 125 U. S. 190 (1887); Wade v. Kalbfleisch, 58 N. Y. 282 (1875); State v. Walker, 36 Kan. 297 (1887); Baity v. Cranfill, 91 N. C. 293 (1884); Francais v. State, 9 Tex. App. (1880).

[4] Cohen v. Cohen, 84 Atl. Rep. 122 (Del., 1912).

and the plaintiff took out his first papers. Before becoming fully naturalized and while still retaining his foreign allegiance, the plaintiff was deserted by his wife in such fashion as to give him ground for divorce under the local statute; he thereupon brought suit, having obtained personal service on the defendant. The court in entering a decree *nisi* said that the plaintiff had acquired a domicile within the state, that marriage was a status over which the state had control in respect to its domiciled residents, and that therefore the plaintiff was entitled to a divorce although an alien whose marriage had been performed according to the laws of a foreign sovereign.

As nationality and citizenship are entirely distinct from domicile[5] the decision in the principal case would be equally applicable if the parties had been citizens of another state and not aliens. Conceding that a state may determine the status of its domiciled residents, the most frequent and important resulting question in this country of forty-eight separate jurisdictions is as to the extra-territorial effect of such a decree on the status and property of the parties.

When neither party is domiciled within the state, it is clear that the court has no jurisdiction and that a decree so rendered will have no binding force as to either party in another state.[6] A few courts have held that when both parties, although not residents, have appeared at the trial, a decree there rendered should be binding in the state of residence in a controversy between the parties,[7] but not in a suit between the state and one of the parties.[8] This distinction, which seems to disregard the fact that marriage is a status and not a contract, has been repudiated by the Supreme Court of the United States.[9] A recent case in England similarly holds that appearance will not cure lack of jurisdiction.[10]

When both parties are domiciled and there has been proper service as required by the local statute, the court has jurisdiction of both the subject matter and the persons. It is settled that a decree rendered under such circumstances will be binding everywhere as to the status of both parties, not only by principles of

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[5] Wharton, Conflict of Laws, § 8, III Ed.; Dicey on Conflict of Laws, 2nd Ed., p. 115.

[6] State v. Armington, 25 Minn. 29 (1878); Hood v. State, 56 Ind. 263 (1877); Hardy v. Smith, 136 Mass. 328 (1884); People v. Smith, 13 Hun. 414 (N. Y., 1878). The cases cited dealt with the validity of Utah divorces under a statute authorizing the grant of divorces to those who merely desired to become residents of the state.

[7] *In re* Ellis' Est., 55 Minn. 401 (1893); Waldo v. Waldo, 52 Mich. 94 (1885).

[8] People v. Dawell, 25 Mich. 247 (1872); Van Fossen v. State, 37 Ohio 317 (1882).

[9] Andrews v. Andrews, 188 U. S. 14 (1902); Loan Society v. Dormitzer, 192 U. S. 125 (1903).

[10] Armitage v. Atty.-Gen., (1906) Prob. 135.

international law,[11] but by virtue of the "full faith and credit" clause of the Federal Constitution.[12]

When either the libellant or the libelee is domiciled within the state, but not both of them, the fundamental difference in this branch of the law between England and this country arises in determining whose domicile shall be the criterion. English courts conceive of a woman as having a separate domicile only when she is in the domicile of matrimony and has been deserted;[13] otherwise her domicile is that of her husband, and she must bring suit wherever that may be.[14] In this country it is generally held that for purposes of divorce a wife may acquire a separate domicile not only at the previous matrimonial domicile,[15] but also in a different state or country.[16] In some jurisdictions it is held that the separation must have taken place without fault in the wife for her to acquire a separate domicile;[17] in others only the actual facts of a separate residence are regarded.[18] This distinction is chiefly of importance in those states which consider service by publication sufficient as regards an absent resident, but insufficient in the case of a non-resident, for then a court in refusing to recognize a divorce granted in another state on such service would have to look behind the finding of the trial court, and hold that the wife was not justified in fact in living apart from her husband.[19]

As intimated above, the international status of the party not domiciled in the divorce jurisdiction will depend upon the view each particular court may take as to the sufficiency of service, and in this country upon the interpretation of the "full faith and credit" clause of the Constitution, jurisdiction of the person as well as the subject matter being essential to give a decree of a court any extra-territorial force. When the suit is brought at the libellee's domicile and the latter is resident within the state, general principles of international law concede that whatever service is provided by local statute, whether personal or con-

[11] Hood v. Hood, 11 Allen 196 (Mass., 1867).

[12] Cheever v. Wilson, 9 Wall. 108 (U. S., 1870).

[13] Dicey on Conflict of Laws, 2nd Ed., p. 263; Armytage v. Armytage, (1898) Prob. 178.

[14] Dicey on Conflict of Laws, 2nd Ed., p. 261; Le Suer v. Le Suer, 1 P. D. 139 (Eng., 1876).

[15] Turner v. Turner, 44 Ala. 437 (1870); Watkins v. Watkins, 135 Mass. 83 (1884); Bowman v. Bowman, 24 Ill. App. 165 (1888).

[16] Harteau v. Harteau, 14 Pick. 181 (Mass., 1836); Harding v. Allen, 9 Me. 140 (1835); Ditson v. Ditson, 4 R. I. 87 (1856); Cheever v. Wilson, 9 Wall. 108 (U. S., 1870).

[17] Sutor v. Sutor, 72 Miss. 345 (1895); Cheely v. Clayton, 110 U. S. 701 (1884); Burleu v. Shannon, 115 Mass. 438 (1875).

[18] Johnson v. Johnson, 57 Kan. 343 (1896); McGrew v. Ins. Co., 132 Col. 85 (1901); Irby v. Wilson, 21 N. C. 568 (1 Dev. & B. Eq., 1837).

[19] Atherton v. Atherton, 155 N. Y. 129 (1898), also in Supreme Court 181 U. S. 155, where it is held that a state may treat a wife who is unjustifiably absent from the matrimonial domicile as if she were in fact domiciled therein, and render a decree on service by publication entitled to recognition in all states under the "full faith and credit" clause.

structive, will be sufficient extra-territorially;[20] when he is domiciled, but non-resident, it is usually held that constructive or substituted service is enough to subject him to the jurisdiction of the court.[21] When the libellee is a non-resident and absent from the state, a number of jurisdictions hold that service by publication is sufficient,[22] but the weight of authority seems to be opposed to this view.[23] A curious result of the latter opinion, generally known as the New York doctrine, is that one party may be legally divorced while the other is still considered as married. That is, if A is domiciled in Nevada and B in New York, a divorce in the former state will in New York be held valid as to A, but not as to B on whom there was no personal service. The Supreme Court of the United States has held that such a situation is not cured by the "full faith and credit" clause, and that while another state may, it is not obligatory that it should recognize such decree.[24] In the principal case[25] the libellant was domiciled within the state and there was personal service on the libellee who was non-resident; assuming that the service on the libellee was technically correct, that is, she was within the state when served,[26] or assuming that she appeared at the trial,[27] the decree rendered should, under the principles discussed above, be entitled to international recognition as to the status of both parties.

No matter what may be its effect extra-territorially, the validity of a divorce decree within the state rendering it, provided that the local statutes have been followed, never seems to be questioned by courts testing such decree collaterally. While it may seem inconsistent for a state to refuse to recognize the decree of another jurisdiction and at the same time itself issue a similar decree under like circumstances, the reasoning of the courts seems sound: that locally they are bound by their statutes, but that collaterally they may apply the settled principles of international law.[28] It has been stated that the constitutional

[20] Fleming v. West, 98 Ga. 778 (1896); Beckerdyke v. Allen, 157 Ill. 95 (1911).

[21] Hunt v. Hunt, 72 N. Y. 217 (1879); Rigney v. Rigney, 127 N. Y. 408 (1891).

[22] Butler v. Washington, 45 La. Ann. 279 (1857); Shafer v. Bushnell, 24 Wis. 372 (1870); Thomas v. King, 95 Tenn. 60 (1895); Thompson v. State, 28 Ala. 12 (1856).

Whether service by publication is sufficient or not depends principally upon the view taken of the nature of the action; if analogous to an action *in rem*, such service gives jurisdiction as held by the above cases; if *in personam*, it does not.

[23] Love v. Love, 10 Phila. 453 (1873); McGeffert v. McGeffert, 31 Barb. 69 (N. Y., 1859); People v. Baker, 76 N. Y. 78 (1879); Doughty v. Doughty, 28 N. J. Eq. 581 (1 Stew., 1877); Sheets v. Sheets, 6 Lanc. Law Rev. (Pa., 1889).

[24] Haddock v. Haddock, 201 U. S. 562 (1906).

[25] Cohen v. Cohen, *supra*.

[26] In a jurisdiction which holds that a wife cannot acquire a separate domicile when at fault, the libellee in the principal case would still be domiciled in Delaware inasmuch as she deserted her husband without cause. Therefore personal service would be unnecessary, and anything amounting to constructive or substituted service would be sufficient.

[27] Kumier v. Kumier, 45 N. Y. 535 (1872); Kinigan v. Kinigan, 15 N. J. Eq. 146 (1867).

[28] Wharton on Conflict of Laws, 3rd Ed. p. 500.

provision of "due process of law" has not been applied to divorce actions, and that if it were, as for instance in *Pennoyer* v. *Neff*,[29] there would be no reason for the unfortunate standard by which there is one test as to validity within the state and another as to validity without the state.[30] It is submitted that it would be more accurate to say that, as the action of divorce differs from other actions, conclusions as to what constitutes "due process" in such other actions are not applicable, and that as a matter of fact courts have considered that there is "due process" as intended by the Constitution in a divorce action whether service on the libellee be personal or substituted.[31] Property may be affected by a decree of divorce, but it is affected by the changed status of the parties, and is not proceeded against in the action. For instance, the dower rights of A in certain land depend upon whether or not she is the wife of B. Consequently it is incorrect to draw analogies from actions in which property rights are in question; it should not be concluded that divorces granted on service by publication are without due process of law because the Supreme Court in *Pennoyer* v. *Neff* held that a personal judgment against a non-resident on such service was invalid, and that no title to property passed by a sale under an execution issued upon such a judgment. *S. A.*

DAMAGES—LOSS OF FUTURE PROFITS—Damages for the loss of future profits, as a general rule, cannot be recovered in an action for the breach of a contract,[1] not so much due to the fact that they are profits as to the fact that there are said to be no adequate criteria which will make certain a reasonably accurate measurement.[2] Consequently, since the fault lies not in the profits themselves, but in ascertaining them, the courts are uniformly willing to allow loss of profits to be included in the damages whenever there are facts sufficient to make the verdict more than mere guesswork. For instance, if either party refuses to complete a contract of sale the measure of damages is the difference between the contract price and the market value.[3]

In the frequently cited case of *Hadley* v. *Baxendale*,[4] it is stated that profits can be recovered where they arise from the contract itself and may reasonably be supposed to have been in the contemplation of the parties when the contract was made, or where they arise from extraordinary circumstances depending

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[29] 95 U. S. 714 (1877).

[30] Wharton on Conflicts of Laws, 3rd Ed. p. 502.

[31] See reasoning of court in Ditson v. Ditson, 4 R. I. 87 (1856).

Maynard v. Hill, 125 U. S. 190 (1887), which held valid a legislative divorce, there being no notice to a non-resident libellee.

[1] Howard v. Stillwater etc. Co., 139 U. S. 199 (1890).

[2] Brigham v. Carlisle, 78 Ala. 243 (1887).

[3] Lincoln v. Alshuler, 142 Wis. 475 (1910).

[4] 9 Exechequer 341 (1854).